INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Denying Writ	2
Argument	3-9
Conclusion	9

CITATIONS

Cases

Bankers Trust Co. v. International Trust Co., 108 Colo. 15, 112 Pac. 2d 656	9
Bennett v. Schofield, 170 Fed. 2d 887	3
Blair, et al, v. Durham, 139 Fed. 2d 260	8
Gaskins v. Bonfils, 79 Fed. 2d 352	9
Gulf Refining Co. v. United States, 269 U. S. 125, 125 46 S. Ct. 52	5, 6
Hartford Life Insurance Co. v. Blincoe, 225 U. S. 129, 41 S. Ct. 276	8
Haseltine v. Central National Bank, 183 U. S. 30, 22 S. Ct. 49	6
Illinois Bell Telephone Co. v. Slattery, et al, 98 Fed. 2d 930	7
Jesionowski v. Boston and M. R. R. Co., 329 U. S. 452, 67 S. Ct. 401	4
Oldland, et al v. Phillips Petroleum Co., 179 Fed. 2d 408	1

INDEX—(Continued)

Page

Phillips Petroleum Co. v. Oldland, et al, 187 Fed. 2d 780.. 1

Sanford Fork and Tool Co., et al, In re, 160 U. S. 247, 16 S. Ct. 291..... 5

Smalley v. Addressograph-Multigraph Corporation, 168 Fed. 2d 585..... 5

Sprague v. Ticonic National Bank, 307 U. S. 161, 59 S. Ct. 777..... 6

Washington C. R. Co., Ex parte, 140 U. S. 91, 11 S. Ct. 673..... 5

Western National Life Insurance Company v. LeClare, 163 Fed. 2d 337..... 3

STATUTES

C. S. A. 1935, Chap. 88, Sec. 2..... 9

28 U. S. C. 1254 (1).....1, 2

28 U. S. C. 2101 (c)..... 2

RULES

Supreme Court of the United States Rule 38..... 2

Tenth Circuit Court of Appeals Rule 16..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 107

PHILLIPS PETROLEUM COMPANY, Petitioner,

vs.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW

The opinion of the District Court is not reported but appears in the record (folios 17-18). The opinion of the United States Circuit Court of Appeals for the Tenth Circuit appears in 187 F. 2d 780. The opinion on the first appeal to the United States Circuit Court of Appeals for the Tenth Circuit appears in 179 F. 2d 408.

JURISDICTION

This Court has jurisdiction to review this case under 28 U. S. C. 1254 (1). It is urged that jurisdiction should not be exercised because the petiton for writ of certiorari

is not accompanied by the record of the lower court, and because the lower court properly allowed interest.

QUESTION PRESENTED

The only question presented on the petition of Phillips Petroleum is whether it was proper to award interest as a part of the judgment recovered by plaintiffs below, respondents here.

STATUTES AND RULES INVOLVED

The Statutes involved are 28 U. S. C. 1254 (1), 28 U. S. C. 2101 (c) and 28 U. S. C. 71 now superseded. Also Rule 38 (3) of the Supreme Court of the United States.

STATEMENT

This proceeding appears to be an independent petition for a writ of certiorari from this Court to review that part of the decision of the lower court which involves the question of interest and is not a cross petition in Cause No. 67, October Term, 1951, in this Court. (Cause No. 67 was docketed as No. 749 at the October, 1950, Term.)

It is not accompanied by the record below but depends for support upon the record filed in Cause No. 67.

Unless this Court sees fit to consider the petition as a cross petition in the other case, Cause No. 67, it is submitted that the petition should not be considered because it is not supported or accompanied by the record below. The petitioner did not apply for a rehearing in the Circuit Court of Appeals and the period of ninety days for it to file a record has elapsed. Regardless of the regularity of the proceedings in this Court, and whether the petition for writ of Certiorari filed by Phillips Petroleum Company should be regarded as a cross petition in Cause No. 67, the case should not be reviewed by this Court on the grounds sought and urged by petitioner Phillips Petroleum Company for the following reasons:

(a) The contention that the mandate of the United

States Circuit Court of Appeals for the Tenth Circuit, following the decision on the first appeal, made no provision for interest was not properly raised by the Phillips Petroleum Company or any other party in any of the proceedings which ended in the judgment reviewed by the Court of Appeals in the Second Appeal. Inasmuch as the question was not properly raised it should not be considered by this Court.

(b) Interest was properly allowed by the trial court even though no reference thereto was made in the mandate of the Circuit Court of Appeals following the decision on the first Appeal.

ARGUMENT

All references to the record herein made are to the record in Cause No. 67, October Term, 1951, of this Court.

The sole objection raised by petitioner, Phillips Petroleum Company (R. 9 and 10) to the proposed form of judgment and decree in so far as interest was concerned was that the obligation was unliquidated. The statement of points filed by petitioner, Phillips Petroleum Company (R. 31 and 32) in compliance with Rule 75 (d), Federal Rules of Civil Procedure, likewise raises only the point that the obligation was unliquidated. It is apparent therefore that the point that the trial court was without authority to award interest was never raised in the trial court.

Rule 16 of the Rules of the United States Circuit Court of Appeals for the Tenth Circuit provides *inter alia:*

> "The statement of points intended to be relied upon shall be printed by the clerk with the record. The court will consider only the points so stated and the parts of the record as designated."

In the case of *Western Nat. Ins. Co. v. LeClare,* 163 F. 2d 337, 9th C.C.A. the Court said on page 340:

> "These points were not stated in appellant's statement of points and hence need not be considered by us."

In the case of *Bennett v. Scofield,* 170 F. 2d 887, 5th C.C.A. the Court said on page 889:

> "Appellants did not designate the complete record to be sent up; nor did they designate as a point upon which they intended to rely, in accordance with Rule 75 (d), Federal Rules of Civil Procedure, 28 U.S.C.A., the failure of the trial court to admit in evidence certified copies of certain pleadings made in a State court of original jurisdiction and that court's judgment. We, therefore, may not consider appellant's contention that the trial court erred in failing to receive the pleadings and the judgment referred to. It is not properly before us."

In the case of *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, 67 S. Ct. 401, Mr. Justice Black, in delivering the opinion of the Supreme Court, said on page 404:

> "The Circuit Court held that this question was not properly raised before it because respondent had failed on appeal to make 'a concise statement' of the point as required by Rule 75 (d) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723 c * * * * We cannot hold that the Circuit Court erred when it refused to consider the question because of respondent's failure to comply with Rule 75 (d)."

In the last mentioned case this Court said that the Circuit Court need not consider a question not properly raised. Conceding that an appellate court may have a discretionary power to raise questions not covered by the statement of points we urge that such power is never exercised where the question was not raised or considered in the trial court. Such practice would be manifestly unfair to the trial court.

It was proper to allow interest under general principles of law and equity. The petitioner's argument to the contrary is predicated on a long line of decisions which hold that if an appellate court remands a case with specific instructions to enter a definite form of judgment, one that ends all further litigation, no further discretion is vested in the trial court and the judgment must be entered in exact conformity to the mandate and opinion of the higher Court.

We do not dispute this principle of law, but we do say it is not applicable to the facts of this case because the United States Court of Appeals for the Tenth Circuit did not pass on the amount of money judgment to be entered by the trial court in its decision on the first appeal, nor did it pass upon the question of interest in any form and did not decide directly or by implication whether interest was or was not to be allowed. The question was left entirely open. That there must be a specific direction to enter a specific form of judgment appears from the following quotation from the case relied on by the petitioner, viz., *Ex Parte Washington G. R. Co.*, 140 U. S. 91, 11 S. Ct. 673:

> "The principle has been well established, in numerous cases, that, on a mandate from this Court, containing a specific direction to the inferior court to enter a specific judgment, the latter court has no authority to do anything but to execute the mandate. Ex Parte Dubuque & P. R. Co., 1 Wall. 69; Durant v. Essex Co., 101 U. S. 555, 556."

In the consideration of questions relating to the application of the "law of the case," it is well to remember that the opinion and the mandate of an appellate court are to be construed together. The opinion is a part of the mandate. See

Smalley v. Addressograph-Multigraph Corporation, 168 Fed. Rep. 2d, page 585 at 586;

Gulf Refining Company of Louisiana v. United States, 269 U. S. 125 at 135, 46 Sup. Ct. Rep. 52 at page 53;

In re: *Sanford Fork & Tool Co., et al.*, 160 U. S. 247, 16 Sup. Ct. 291.

In the last mentioned case the Court, after stating the rule that when a case has once been decided by the Court on appeal and remanded to the lower Court, whatever was before the appellate court and disposed of by its decision is considered as finally settled, then continues with the following language:

"But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. Hinkley v. Morton, 103 U. S. 764; Mason v. Mining Co., 153 U. S. 361, 14 Sup. Ct. 847; Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U. S. App. 97, 2 C.C.A. 542 and 51 Fed. 929. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a write of mandamus or upon a new appeal it is for this court to construe its own mandate, and to act accordingly. Sibald v. U. S., 12 Pet. 488, 493; West v. Brashear, 14 Pet. 51; Supervisors v. Kennicott, 94 U. S. 498; Gaines v. Rugg, 148 U. S. 228, 238, 244, 12 Sup. Ct. 611.

"In the case now before us, it is important, in determining what was heard and decided by the circuit court in the first instance, and by this court upon the appeal, to bear in mind, the settled practice of courts of chancery, recognized and regulated by the rules established by this court for the circuit courts sitting in equity. Rev. St. Secs. 916-918."

The general rule is that the face of the judgment is the test of its finality, and by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final.

See

Gulf Refining Company of Louisiana, et al., v. U. S., 269 U. S. 125, 46 Sup. Ct. Rep. 52 at 53;

Haseltine v. Central National Bank of Springfield (No. 1), 183 U. S. 130, 22 Sup. Ct. Rep. 49.

An issue or question of fact not specifically covered by the mandate or the opinion and not passed upon is subject to reconsideration by the lower court. In support of this statement the following appears in the case of *Sprague v. Ticonic National Bank,* 307 U. S. 161 at page 168, 59 Sup. Ct. 777 at 780, 781:

"The general proposition which moved that Court —that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest—is indisputable. Compare Kansas City Southern Ry. v. Guardian Trust Co., 281 U. S. 1, 50 S. Ct. 194, 73 L. Ed. 659. But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See In re Sanford Fork & Tool Co., 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; Ex parte Century Indemnity Co., 305 U. S. 354, 59 S. Ct. 239, 83 L. Ed 216."

The principles of law applicable here are stated as follows in the case of *Illinois Bell Telephone Company v. Slattery, et al.* (Seventh Circuit Court of Appeals), 98 Fed. 2d 930, in which the following appears at page 932:

"We think, undoubtedly, the solution of the question before us must be made to depend upon a determination as to whether the lower Court, in entering the decree of February 5, 1938, failed or refused to give effect to, or misconstrued the mandate of the Supreme Court. The law seems to be well settled that a lower Court is free to determine any matter left open by the mandate of the higher court. Our attention is called to a number of authorities which sustain this principle. The case of Mason v. Pewabic Mining Co., 153 U. S. 361, 14 S. Ct. 847, 38 L. Ed. 745, is pertinent to the situation. There, as here, a fund was created as a result of a mandate of the Supreme Court. It was there held that no question was involved in the original suit as to the disposition of the fund in controversy and that the lower Court was consequently free to consider the question because it was a new one and an appeal lay only to the Circuit Court of Appeals."

Every case on the subject cited by the petitioner where-

in, on reversal of a judgment, it was held that the lower Court had no authority to enter judgment on matters not specified in the mandate of the appellate Court involved instances where every issue was finally decided and the appellate Court was able to direct the entry of a money judgment or other specific judgment which would end all litigation. The rule does not apply where the decision of the appellate Court in effect decides how a fund is to be disbursed or the persons who are entitled to share therein, but the amount of the fund is not determined or computed in the decision.

In *Blair, et al., v. Durham* (C.C.A.) (Sixth Circuit), 139 Fed. Rep. 2d 260, the Court states at page 261 that all cases which hold that interest is not allowable on the judgments affirmed by the Circuit Court of Appeals are founded upon the provisions of 28 U.S.C. 878 (now U.S.C.A. 1912). In cases in which interest is denied on the affirmance by the Circuit Court of Appeals of a money judgment, said statute applies and those cases are to be distinguished from the facts in the present case.

The following appears in *Hartford Life Insurance Company v. Blincoe,* 255 U. S. 129 at 136, 41 Sup. Ct. Rep. 276 at 278:

> "Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to."

Since it appears that the Circuit Court of Appeals of the Tenth Circuit did not consider or pass upon the question of the amount of the money judgment to be recovered by plaintiffs or whether interest was to be included, the argument of counsel that, since interest was not referred to in the mandate, interest is not to be allowed, is untenable.

Under Colorado law the allowance of interest was not only proper but was required under the Statute which reads as follows:

> "Creditors shall be allowed to receive interest, when there is no agreement as to the rate thereof, at

the rate of six per cent per annum, for all moneys after they become due, on any bill, bond, promissory note or other instrument of writing. * * * * * * and on money received to the use of another and retained without the owner's consent, expressed or implied, from the receipt thereof; and on money taken or retained and fraudulently converted to the taker's use from the time of taking."

C.S.A. 1935 Sec. 2 Chap. 88.

To the same effect see:

Bankers Trust Co. v. International Trust Co., 108 Colo. 15, 112 Pac. 2d 656;

Gaskins v. Bonfils (Tenth Circuit Court of Appeals) 79 Fed. 2d 352.

CONCLUSION

For the foregoing reason it is respectfully submitted that the petition for writ of certiorari filed by the Phillips Petroleum Company to review the question of the allowance of interest should be denied.

Respectfully submitted,

FRANK DELANEY,
L. H. LARWILL,
Counsel for Respondents.